

Local 383, Operative Plasterers and Cement Masons International Association, AFL-CIO¹ and W. E. O'Neil Construction Company and Local 741, Laborers' International Union of North America. Case 25-CD-224

May 16, 1983

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following a charge filed by W. E. O'Neil Construction Company, herein called the Employer, alleging that Local 383, Operative Plasterers and Cement Masons International Association, AFL-CIO, herein called the Cement Finishers, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by Local 741, Laborers' International Union of North America, AFL-CIO, herein called the Laborers.

Pursuant to notice, a hearing was held before Hearing Officer Robert E. Hayes on November 22, 1982. All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. Thereafter, the Employer filed a brief with the Board.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings:

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, an Illinois corporation with its principal place of business in Chicago, is a general contractor. During the past year, the Employer purchased materials from outside the State having a value of \$50,000. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and

it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Local 383, Operative Plasterers and Cement Masons International Association, AFL-CIO, and Local 741, Laborers' International Union of North America, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *The Work in Dispute*

The work in dispute involves the removal of wall ties and the plugging, grouting, or other patching of holes left by such removal at the Jordan Hall construction site in Bloomington, Indiana.²

B. *Facts and Background*

The Employer acted as general contractor on the Jordan Hall project, a six-storied addition to a laboratory and classroom building for biological sciences. It was responsible for all of the finishing work within the structure, and coordinating the mechanical, electrical, and equipment installation contracts. The work in dispute involves the breaking of wall ties and the plugging of holes left by the ties. It is performed after concrete is poured into large wooden or metal forms. As this is done, pieces of steel wire (wall ties) are used to prevent the form from bursting apart. After the concrete hardens, the wall forms are removed but the wall ties remain in the form with parts protruding from the wall. The protruding pieces must be broken off and the small holes are plugged with mortar or grout. The holes may not need to be covered with masonry or drywall if the wall is not exposed. It takes approximately 10 seconds to snap the tie and plug the hole and the work is customarily done by a laborer. If any finishing work has to be done, such as rubbing or smoothing out of the area where the hole was plugged, the procedure takes longer and is usually done by a cement finisher.

At the time the Employer was working on the Jordan Hall project, employees represented by the Laborers were performing the disputed work. On

¹ The caption is amended to reflect the full name of the Respondent as stated at the hearing.

² The Employer acted as general contractor on two construction sites for Indiana University in Bloomington, Indiana: the Jordan Hall project and the 10th and Fee Lane project. The work in dispute is the removal of wall ties and the patching of tie holes at the Jordan Hall project. Due to differences in finishing work required on the projects, members of the Cement Finishers performed the removal of wall ties and patching of tie holes at the 10th and Fee Lane project and the record contains no claim by the Laborers for that work. Therefore, the Board's determination under Sec. 10(k) is limited to an award of the removal of wall ties and the patching of tie holes at the Jordan Hall project.

November 3, 1982, the business agent representing the Cement Finishers stated to the project manager at the Jordan Hall site that cement finishers should be performing the disputed work and threatened to picket the project. Later that same day, the Cement Finishers set up pickets at the Jordan Hall project and the 10th and Fee Lane project. The picketing was discontinued within 2 days.

C. *The Contentions of the Parties*

The Employer contends that it has assigned the work to employees represented by the Laborers in accordance with industry and area practice, and the collective-bargaining agreement, and for reasons of economy and efficiency of operations.

Apparently, the Cement Finishers asserts that the object of the picketing was purely informational and that the disputed work is within its jurisdiction and should have been awarded to its members.³

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

At the hearing, the Cement Finishers contended that the object of its picketing was to inform the public that it did not have a contract with the Employer. Although one object of the picketing may have been to protest the fact that the Cement Finishers did not have a contract with the Employer, the Board must still determine whether an object of the picketing was to force or require the Employer to assign the work to individuals represented by the Cement Finishers.⁴

The evidence discloses that on November 3, 1982, the business agent for the Cement Finishers approached the project manager for the Jordan Hall project to protest the fact that laborers from Local 741 were performing the disputed work. Specifically, the business agent for the Cement Finishers stated, "You have work here for the Cement Finishers and you have the Laborers doing it and I can't control my work without a bargaining agreement." In failing to secure the disputed work for the Cement Finishers, its business agent indicated that he would handle the dispute in a different way. That afternoon, the Cement Finishers began picketing at both sites. Thus, the picketing closely

followed unsuccessful attempts by the Cement Finishers to persuade the Employer to reassign the disputed work to its members. Therefore, the evidence shows that an object of the Cement Finishers' picketing was to force or require the Employer to reassign the disputed work to employees represented by the Cement Finishers.

Accordingly, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Further, there is no evidence in the record and no party contends that an agreed-upon method exists for the voluntary adjustment of this dispute. Therefore, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.⁵ The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.⁶

The following factors are relevant in making the determination of the dispute before us:

1. *Collective-bargaining agreement*

On July 1, 1982, Employer became signatory to a collective-bargaining agreement negotiated by and between the Laborers Negotiating Committee of the Associated General Contractors of Indiana, Inc., and the Laborers' International Union of North America, State of Indiana, District Council for and on behalf of is affiliated Local Unions. The Laborers is an affiliated local covered by the agreement. The agreement is effective until March 31, 1985. Article I, section 1, of the agreement makes reference to and incorporates the work described in "The Laborers' International Union of North America, State of Indiana, District Council Jurisdictional Guidelines Booklet." The work described in the guidelines booklet includes the disputed work.⁷

The Employer does not have a contract with the Cement Finishers. Accordingly, the existence of a collective-bargaining agreement between the Em-

³ Since the Cement Finishers did not file a post-hearing brief, this contention is based on testimony given at the hearing by its business agent.

⁴ *Cement Masons Local 577 (Rocky Mountain Prestress)*, 233 NLRB 923, 924 (1977).

⁵ *NLRB v. Radio & Television Broadcast Engineers Union, Local 1212, IBEW* [Columbia Broadcasting], 364 U.S. 573 (1961).

⁶ *Machinists, Lodge 1743 (Jones Construction)*, 135 NLRB 1402 (1962).

⁷ At the hearing, James Hardy, business manager for the Laborers, read into the record the section relating to the disputed work. The section reads as follows:

The snapping of wall ties and removal of tie rods, the handling, placing, and operation of the nozzle, hoses, and pots or hoppers on sand blasting or other abrasive cleaning. The jacking of slip forms and all semi and unskilled work connected therewith.

ployer and the Laborers favors assignment of the work in dispute to employees represented by the Laborers.

2. Employer and area practice

Uldis Bruveris, project manager for the Jordan Hall project, testified that, in his 20 years of experience, construction contractors in the area, including the Employer, consistently use employees represented by the Laborers for snapping wall ties and plugging holes on projects that require little or no finishing work. On projects where substantial finishing work is required, the work is customarily performed by employees represented by the Cement Finishers. At the Jordan Hall project, little or no finishing work is required following the performance of the disputed work. Thus, we find this factor favors an award to employees represented by the Laborers.

3. Skills, economy, and efficiency of operation

Employees represented by the Laborers or the Cement Finishers are equally experienced in and qualified for the snapping of wall ties and plugging of holes. However, the disputed work is a relatively simple job to perform and generally does not require much time to complete. The Employer utilizes employees represented by the Laborers because: (1) finishing work was not required to be performed upon completion of the work in dispute; and (2) they can perform the work in dispute along with their other nonskilled work on the project. Also, the disputed work occurs only sporadically, 1 or 2 hours at a time. Thus, it is more efficient and economical for the Employer to complete the limited disputed work with a crew represented by the Laborers than to hire an irregular, casual, or part-time employee represented by the Cement Finishers. Accordingly, we find that, while the factor of skill favors neither group of employees, the factor of economy and efficiency favors an award to employees represented by the Laborers.

4. Employer assignment and preference

The Employer assigned the work in dispute to, and prefers that it be performed by, employees rep-

resented by the Laborers; this factor, while not determinative, favors an award to these employees.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement, employer and area practice, economy and efficiency of operation, and the Employer's assignment and preference. In making this determination, we are awarding the work in question to employees who are represented by the Laborers, but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

Pursuant to Section 10(k) of the National Labor Relations Act, as amended, and upon the basis of the foregoing findings and the entire record in this proceeding, the National Labor Relations Board makes the following Determination of Dispute:

1. Employees of W. E. O'Neil Construction Company, who are represented by Local 741, Laborers' International Union of North America, AFL-CIO, are entitled to perform the removal of wall ties and the plugging, grouting, or other patching of holes left by such removal at the Jordan Hall project on the campus of Indiana University in Bloomington, Indiana.

2. Local 383, Operative Plasterers and Cement Masons International Association, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require W. E. O'Neil Construction Company to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 383, Operative Plasterers and Cement Masons International Association, AFL-CIO, shall notify the Regional Director for Region 25, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.